No. 87-794

In the SUPREME COURT of the United States

OCTOBER TERM, 1987

CHARLES PENMAN,

Petitioner,

vs.

PUBLICISTS GUILD, LOCAL 818, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION THREE

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES

Petitioner has named Respondent in such a way as to suggest that both the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE") and its affiliate local, Publicists Guild, Local 818 are parties hereto. The International has never been a party to this lawsuit, and the Respondent is more properly referred to by the name shown on the caption of this Brief in Opposition to Petition for Certiorari.

COUNTERSTATEMENT OF FACTS

The undisputed record in this case shows the following. Petitioner Charles Penman ("Petitioner" or "Penman") was employed by Warner Brothers, Inc. ("WBI") from 1973 until August 31, 1979, when his employment with WBI was terminated. From August 1, 1978 until August 31, 1979, Penman worked as a Junior Publicist in WBI's Publicity Department. At all times during his tenure as a Junior Publicist, the terms and conditions of Penman's employment were governed by a Collective Bargaining Agreement betwen WBI and Publicists Guild, Local 818 ("the Union"). Until August 1, 1979, the applicable Agreement was the 1976-79 contract; on August 1, 1979, a successor Agreement, executed in December 1979 and retroactively effective, became the governing document.

In both the 1976 and 1979 contracts between WBI and the Union, Article 7 contained a formal and binding grievance and arbitration procedure for resolving "any dispute between the Local Union or any of the persons subject to [the] Agreement and the Producer with regard to wage scales, hours of employment or working conditions or with regard to the interpretation of this Agreement concerning such provisions." Although the 1976 Agreement contained specific language protecting employees on the "Industry Roster" from discharge without cause, both contracts contained references to "discharge for cause" outside of the Industry Roster provisions.

Following his termination, Penman retained the services of a private attorney, Clarence Lowe, to

represent him with respect to his termination. Penman asked the Union for permission to have Lowe represent him in connection with his discharge grievance and arbitration. The Union agreed, but remained available to assist Lowe when asked. At no time did the Union ever refuse to take Petitioner's grievance to arbitration.

On September 5, 1979, Penman, with the assistance of Lowe, filed a grievance against WBI with respect to Penman's termination. On September 6, 1979, the Union, through Business Agent Mac St. Johns, also filed a grievance against WBI on behalf of Petitioner. The grievance filed by the Union requested that Penman be reinstated to his position and that he be paid back salary from the date of his termination to the date of reinstatement.

The filing of the grievances by and on behalf of Petitioner led to a "second step" grievance meeting on October 11, 1979. Union Business Agent St. Johns represented Appellant at this meeting. Despite St. Johns' efforts at this meeting, WBI refused to reinstate Penman.

On October 12, 1979, the Union notified Penman's attorney, Lowe, of the results of the second step grievance meeting. St. Johns also advised Lowe that if he and Penman wanted to proceed to arbitration, the Union would notify WBI and make the necessary arrangements for the arbitration.

On October 16, 1979, the Union notified WBI that Penman's grievance would be proceeding to arbitration and that Penman would henceforth be represented by Clarence Lowe. Following this letter, an arbitration hearing was scheduled for November 8, 1979. On October 16, 1979, however, Lowe wrote to St. Johns

and requested that the arbitration hearing be continued because Lowe had a prior commitment. On November 13, 1979, and again on February 28, 1980, St. Johns wrote to Lowe and suggested several other dates for the arbitration hearing. Lowe did not respond to these letters, and as a result, the arbitration was never rescheduled.

Lowe eventually decided that Penman's grievance was unmeritorious and that proceeding to arbitration would be "futile". Lowe therefore made a decision to abandon the grievance. Lowe's decision was based upon his review of the contract, various arbitration decisions which had been provided to him by the Union, and the merits of Petitioner's case.

COUNTERSTATEMENT OF THE CASE

Penman began his case with a variety of claims against WBI and the Union, including state law claims for wrongful discharge, federal claims for racial discrimination and breach of the duty of fair representation, and later, for equitable estoppel. WBI moved for summary adjudication of the issues, and the Union moved for summary judgment, both on the basis of the First Amended Complaint. Both were successful.[1] (See Penman's Petition for Writ of Certiorari, hereinafter referred to as "Petition," Appendix B) As to WBI, the trial court concluded that the 1979 collective bargaining agreement governed Penman's employment, and that because Penman had

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[1] WBI went to trial on the remaining issues and successfully brought a motion for nonsuit.

elected not to exhaust the grievance and arbitration procedure provided in the contract, he could not state a claim for wrongful discharge. As to the Union, the court found that Penman's attorney had made his own decision not to pursue arbitration, and that his decision was not the result of union conduct. Accordingly, the court granted the Union's motion for summary judgment.[2]

Penman appealed the trial court's entry of summary judgment in favor of the Union on the issues of breach of the duty of fair representation, and equitable estoppel. His fair representation argument, simply stated, was that because his discharge was arbitrable under the 1979 agreement, he was required to exhaust contractual grievance procedures; that because the Union representative gave "misleading" advice to his attorney, he failed to exhaust those procedures; and that the Union's offer of bad advice was therefore a breach of its duty of fair representation. Penman also argued that because of the alleged misrepresentation, the Union should be equitably estopped from contend-

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[2] For reasons unclear from the record, the trial court, simultaneous with the summary judgment, granted Penman's motion for leave to file a second amended complaint against both defendants. This potentially confusing action was clarified by an almost immediate grant of a second summary judgment in favor of the Union, based upon the second amended complaint. The second amended complaint differed from the first in that it added a cause of action for equitable estoppel against the Union. For present purposes, the Union will treat the trial court's action as a single judgment based upon the totality of the allegations directed against the Union in both the first and second amended complaints.

ing that he was required to exhaust contractual procedures.

The Court of Appeal rejected both arguments. It wrote:

> "At most, St. Johns was negligent. While St. Johns did not have a copy of the final version of the 1979-1982 agreement when he wrote the December 18 letter to Lowe, he was an experienced business agent and in fact, signed the agreement on behalf of the Union. However, as pointed out *ante*, had St. Johns had a copy of the 1979-1982 agreement, he may have been as confused as we were by its provisions. He may have concluded the "discharge for cause" language in Article 7 was inserted by mistake because it did not relate to any other language in the 1979-1982 agreement and so informed Lowe. From this record, there is no reason to believe St. Johns would not have forwarded a copy to Lowe for Lowe to scrutinize in a lawyer-like manner on behalf of his client as soon as one was available. While St. Johns' interpretation was misleading, there was no showing of fraudulent concealment, or of unfair, dishonest or agregious conduct by him. Therefore, there was no breach of duty of fair representation.
>
> Further, these facts do not support any recovery by Penman against the Union pursuant to the doctrine of equitable estoppel. Even if we were to conclude such an alternative theory were available to Penman

> pursuant to *Hass v. Darigold Dairy Products Co.* (9th Cir. 1985) 751 F.2d 1096, 1099-1100, the elements thereof do not exist on this record. . . .
>
> Penman had *no case* in the beginning, and it did *not* get any stronger as it progressed."

(Petition, pp. A-16 — A-17) (emphasis in original)

The Court of Appeals' decision also contained dicta concluding that the applicable collective bargaining agreement did not protect Penman from at will discharge. (Petition, p. A-10) Because Penman evidently believes that such a conclusion would have supported a reversal of the trial court's dismissal of the state law wrongful discharge claims due to federal preemption, and because Penman did not appeal that issue, he is understandably frustrated. This frustration evidently led to his petition for review before the California Supreme Court. The Court, en banc, summarily denied review. Penman now seeks review before this Court based upon the same allegations of error.

SUMMARY OF ARGUMENT

None of the traditional reasons for granting certiorari are present in this case. The California Court of Appeal has applied well settled federal precedent to an undistinguished set of facts. There is no conflict between the decisions of state and federal courts, nor between circuit courts. There is nothing here but obedient and predictable fidelity to the principles and precedents of federal labor law.

Nonetheless, Petitioner has attempted to recast his arguments as questions of importance to this Court. His first argument is that the Court of Appeal has denigrated the federal labor policy in favor of arbitration by holding that Penman had no substantive right to arbitration. What Penman fails to note, however, is that the question of whether or not his discharge was arbitrable goes primarily to the issue of whether or not federal law required him to exhaust the grievance and arbitration procedure provided by the collective bargaining agreement as a prerequisite to suit against the employer.

Thus while it is true that the trial court found that exhaustion was required, it did so in connection with Penman's claims against his employer, WBI. WBI was not a party to the appeal, and neither the trial court's decision on WBI's motion for summary adjudication, nor the Court of Appeal's comments about that portion of the lower court's minute order are appropriate issues for review.

The Court of Appeal affirmed a summary judgment in favor of the Union on the issues of breach of the duty of fair representation, and equitable estoppel. On the breach of duty of fair representation issue, the Court affirmed on the basis of a specific finding that, under the governing standard, the Union's conduct did not constitute a breach. This conclusion was independent of any opinion as to the potential for success in arbitration on the merits of the grievance. The Court's decision was limited to a straightforward application of clear federal precedent; its discussion of the arbitrability of Petitioner's grievance was unnecessary to its

decision and does not present an issue for review by this Court.

In a further attempt to create an issue for review, Penman suggests that the Court of Appeal applied the standard used by the Seventh Circuit in judging union conduct when the preferred standard is that employed by the Ninth Circuit. Had the Court of Appeals applied the rule of *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983), Penman argues, "the result would clearly have been in favor of Petitioner." (Petition, p. 23) Petitioner is confused.

First, it is evident from the Court of Appeal's opinion that the decision is based upon Ninth, rather than Seventh Circuit caselaw. (Petition, p. A-13 — A-16) Second, Petitioner misreads *Dutrisac*. That case imposes liability upon unions for unexplained failures to perform ministerial acts such as meeting deadlines for the filing of grievances. 749 F.2d at 1274. It specifically shields unions from liability for errors of judgment. *Id.* at 1273. Here it is undisputed that the union facilitated arbitration for Penman, but that Penman's attorney chose not to proceed. The only "misconduct" alleged is the union's arguably mistaken interpretation of the contract. Because contract interpretation is an exercise of judgment, *Dutrisac* does not apply. See *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), cert. den., ___U.S___, 106 S.Ct. 1642, 90 L.Ed. 2d 187 (1986).

Penman also continues to dispute evidentiary issues. Throughout this litigation, he has regarded the Union's arguably confusing interpretation of the contract communicated to Lowe as violative of the Union's duty

of fair representation. The caselaw, however, does not support Petitioner's belief. See, e.g., *Peterson, supra.*

Similarly, Penman has consistently viewed an employer memo containing unsubstantiated statements regarding the Union "going through the motions" as solid evidence of a "diabolical conspiracy" to foil Penman's efforts in arbitration. If, as Penman charges, the lower courts ignored the memo in deciding the case, such exclusion from consideration was an appropriate response to hearsay. See California Code of Civil Procedure § 437(d); California Evidence Code § 1200. Further, assuming that the Union representative was unenthusiastic about the merits of the grievance, the undisputed record evidenced consistent cooperation and assistance from the Union, and would not support a finding of bad faith.

Penman's last argument is that the Court of Appeal failed to decide the question of whether or not Penman was entitled to recover on a theory of equitable estoppel. But the Court did decide this issue. It concluded that the undisputed facts did not satisfy the elements of the doctrine. Having reached that conclusion, it was unnecessary to determine the viability of the theory in the abstract. Again, there is no basis for a grant of certiorari.

For all of these reasons then, Respondent Union respectfully requests that the Court deny the Petition.

ARGUMENT

I

THE COURT OF APPEAL'S DISCUSSION OF SUBSTANTIVE ARBITRABILITY IS IRRELEVENT TO THE VALIDITY OF ITS DECISION

Penman's challenge to the Court of Appeal's conclusion that his grievance was not arbitrable is easily explained. Inherent in his argument is the assumption that had the trial court reached the same conclusion, he would have been able to maintain state law wrongful discharge claims. While this may be true, and it may be frustrating, it leads nowhere.

Penman did not appeal the trial court's dismissal of his tort claims. Instead, he accepted and conceded the effect of federal preemption under *Allis-Chalmers Corporation v. Lueck*, 471 U.S. ___, 105 S.Ct. 1904 (1985), and his failure to exhaust contractual remedies as required by *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 653, 85 S.Ct. 614 (1985). He appealed only the judgment entered in favor of the Union, and limited the issues to equitable estoppel and a breach of the duty of fair representation theory based on the Union's alleged "derailment" of his grievance by what he saw as intentional misrepresentation.

The question, then, is the significance of the Court of Appeal's observation that Penman did not have an arbitrable grievance. The answer is that it is of no significance. It is not necessary to the affirmance; it is, in the Court of Appeal's own words, "surplusage".

In discussing arbitrability in a wrongful discharge/ breach of duty of fair representation action, there are two possible conclusions. If the grievance is arbitrable, the grievant must exhaust contractual procedures prior to bringing suit directly against the employer. *Republic Steel, supra.* If it is not arbitrable, there is no exhaustion requirement. In either case, the exhaustion analysis goes to the question of whether or not the employee may sue the employer directly, and does not aid a decision as to a union's culpability.

Penman nonetheless seeks to eradicate the Court of Appeal's discussion suggesting that exhaustion might not have been required. His reasons are clear. If his grievance was not arbitrable, the Union's alleged misconduct could not have resulted in harm, and even a reversal of the Court's holding on the liability issue would not result in damages. See *San Francisco Web Pressmen & Platemakers No. 4 v. NLRB*, 794 F.2d 420, 423-24 (9th Cir. 1986) (no back pay award where there was no showing that the grievant would have prevailed had the grievance gone to arbitration).

Moreover, if Penman did not have to exhaust his contractual remedies, neither did he have to attempt to establish a breach of the Union's duty as an excuse for his failure to do so. See generally, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). For Penman, the exasperating conclusion to be drawn from the Court's gratuitous discussion of arbitrability is that he should have appealed the judgment entered in favor of the employer, argued against coverage by the collective bargaining agreement, and pursued the state law wrongful discharge claims forfeited in this appeal.

Penman chose the opposite path, and it is not for this Court to indulge Petitioner's revisory desires.

II

THE COURT OF APPEAL PROPERLY APPLIED THE GOVERNING STANDARD FOR BREACH OF THE DUTY OF FAIR REPRESENTATION CLAIMS

Although Petitioner has tried to manufacture a circuit split in an effort to state a basis for certiorari, no such conflict exists. The Court of Appeal did not, as Penman seems to believe, apply the Seventh Circuit's standard requiring a showing of intentional union misconduct. The Court relied upon decisions of this Court, and of the Ninth Circuit. (See Petition, Appendix A) Penman's argument that reliance upon Ninth Circuit precedent would have yielded a different result is therefore somewhat mystifying. Nonetheless, because Penman places his confidence in cases such as *Dutrisac v. Caterpillar Tractor Company*, 749 F.2d 1270 (9th Cir. 1983), the Union will address the question of the governing standard and its application to the facts of this case.

A. The Union's Duty of Fair Representation Was Deactivated By Attorney Lowe's Representation of Penman.

Although both the trial court and the Court of Appeal concluded on the basis of undisputed facts that the Union had not breached its duty of fair representation, it is not entirely clear that the Union's

duty of fair representation was triggered by the specific facts of this case. The duty exists because of the exclusive nature of a union's representational role. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681 (1953).

When a union is the unavoidable intermediary between an employee and a remedy, the exclusiveness of the union's role generates a corresponding duty of fairness. Thus, when the question is one of access to contractual procedures available only to union representatives, the duty comes into play. See generally, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). But when the union does not have exclusive access to a given procedure, and the represented employees themselves have the right to seek relief, the duty does not apply. See e.g., *Eichelberger v. NLRB*, 765 F.2d 851, 856-857 (9th Cir. 1985).

Here, at Penman's request, the Union permitted a private attorney to take over representation of Penman in the handling of his grievance. As a legal matter, then, because the Union in the specific circumstances of this case was not to be the exclusive representative of the employee, either in the grievance procedure or at arbitration, there is no statutory or common law duty on the part of the Union. This was, in essence, the conclusion of the trial court when it found that the decision of Penman's counsel not to arbitrate was a "conscious decision" based on the merits of the claim, rather than a result of Union misrepresentation. Likewise, the Court of Appeal found that "as an afterthought, [Penman] sought to shift the blame to the Union, and excuse his non-compliance with a

contention that the Union breached its duty of fair representation to him." The responsibility, the lower courts concluded, lay with Petitioner.

B. Federal Law Does Not Impose Liability For Errors Of Judgment.

Assuming, however, that the duty of fair representation was fully applicable, federal case law leaves no question but that the Union did not breach it duty. The essence of Penman's Complaint against the Union is that the Union allegedly gave incorrect information to Penman's attorney regarding the contents of the new collective bargaining agreement retroactively applicable to Penman's discharge. Without discussing the details of the contract or the merits of Penman's grievance, we will assume for the purposes of argument that the Union representative misinterpreted the terms of the new contract.

The result is the same. The Court of Appeal relied on valid, mainstream federal precedent to find that if the Union had given the wrong information to Penman's counsel, it was at most the result of negligence, and that mere negligence does not constitute a breach of the duty of fair representation. (See Petition, pp. A-12 — A-16)

The validity of the Court's decision, and its consonance with the law of the Ninth Circuit as to the applicable federal standard, is illustrated by several Ninth Circuit decisions decided after those discussed by the Court of Appeal. In *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), *cert. den.* ___U.S.___, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986), the Ninth Circuit

reaffirmed its strongly held principle of deference to union conduct. In that case, a football player went to his union for advice concerning the filing of a grievance to protest being cut from his team. The player's contract contained two separate grievance procedures, one for injury grievances, and one for non-injury grievances. An attorney for the union advised the player that he should pursue the injury grievance. In reliance upon the attorney's advice, the player relinguished the non-injury theory in favor of the injury theory.

The advice was wrong. As things turned out, the correct approach would have been to file a non-injury grievance. When the mistake was discovered, it was too late; although the union tried to "rechannel" the non-injury grievance, it was dismissed as untimely. As a result of the union's error, the player lost all opportunity to pursue a viable grievance.

The Court upheld the judgment entered in favor of the union. After reviewing the development of the duty of fair representation standard in the Ninth Circuit, the Court discussed the policy supporting the generous measure of deference granted to unions:

> "Sound policy reasons militate against imposing liability on unions for errors in judgment made while representing their members in the collective bargaining process. . . . [H]olding unions liable for such errors would serve ultimately to 'defeat the employees' collective bargaining interest in having a strong and effective union.' If unions were subject to liability for 'judgment calls', it would necessarily undermine their discretion to act on

> behalf of their members and ultimately weaken their effectiveness. . . . Such a result would be inconsistent with our oft-repeated commitment to construe narrowly the scope of the duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent."

771 F.2d at 1255. There is therefore no longer any question but that a union's good-faith efforts to fairly represent its members — even if negligent, and even if they involve poor judgment — cannot result in liability.

Additional support for the same proposition is found in the recent case of *Scott v. Machinists Automotive Trades District*, 815 F.2d 1281 (9th Cir. 1987). In *Scott*, the Ninth Circuit again reviewed the case law governing the appropriate standard in breach of duty of fair representation cases. The plaintiff in *Scott* contended that the union had represented to him that the company would be offering at least $70,000.00 in settlement of his grievance; that he returned to work in reliance upon that representation; and that only $20,000.00 was actually offered. After reviewing the relevant standard, the Court wrote:

> "Even if the union representative misstated the amount Safeway intended to offer in settlement, at most this misstatement was arguably negligent. It did not rise to the level of arbitrary conduct required to establish a breach of the union's duty of fair representation. [Citing *Peterson*, supra.] It is also not clear how this misstatement prejudiced Scott's position.

> Given the narrow construction of the basis upon which breach of a union's duty of fair representation may be predicated, we hold that the District Court did not err in granting summary judgment in favor of the union."

815 F.2d at 1285.

These are the controlling principles. An error of judgment, or an act of simple negligence, does not amount to actionable misconduct. The Court of Appeal was therefore correct in affirming the trial court's grant of summary judgment.

C. This Case Does Not Fit Within The Narrow Exception Articulated In *Dutrisac*.

Penman seeks to squeeze this case within the narrow confines of *Dutrisac v. Caterpillar Tractor Company*, *supra*, 749 F.2d 1270. In that case, the union missed the deadline for filing a grievance. The union had previously judged the grievance to be meritorious, and declared its intention to pursue the matter to arbitration. *Dutrisac*, *supra*, 749 F.2d at 1273-74. The missed deadline was not a conscious act, but an unexplained accident. No judgment was involved, and the Court found liability acceptable as a means of tightening the union's control over the mechanical function of filing grievances in a timely manner. *Id.*, at 1274.

The decision itself was limited to "ministerial acts". *Id.*, at 1273. Subsequent decisions have consistently limited *Dutrisac*'s "seeming aberrance" in interjecting a negligence standard, *Eichelberger*, *supra*, 765 F.2d at 855, and have highlighted the contrast between

ministerial acts and a union's conscious exercise of judgment. *Id.*, at 855, note 7. *Accord Peterson v. Kennedy, supra,* 771 F.2d at 1254, and *Castelli v. Douglas Aircraft Company,* 752 F.2d 1480, 1482-83 (9th Cir. 1985). Because the alleged union misconduct in this case is providing an arguably misleading interpretation of the collective bargaining agreement, rather than an unexplained and severely prejudicial failure to perform a necessary task on a member's behalf, this case falls well within the range of discretion accorded unions in the performance of their representational function.

To the extent that Penman relies upon *Robesky v. Qantas Empire Airline, Ltd.*, 573 F.2d 1082 (9th Cir. 1982), that reliance is similarly misplaced. In *Robesky*, the company offered the grievant reinstatement in settlement of her grievance. Unknown to the grievant, the union had decided not to take her grievance to arbitration. In reliance upon the union's original representation that it was going to arbitration, the grievant rejected the company's offer. The Court found:

> "The union officers were fully aware of the situation. It was they who had decided prior to negotiations that appellant's grievance would not be arbitrated. It was they who had agreed to and accomplished a formal withdrawal of the grievance from arbitration as an element of the settlement. The union officers had ample opportunity to convey the critical information to appellant. . . . "

Id., at 1091.

The Union's alleged misconduct in *Robesky* was thus the unexplained failure to perform the very small task of notifying the grievant of its withdrawal of her grievance. By contrast, the misconduct alleged in this case is communication of a Union representative's best judgment as to the meaning of a new agreement which had not yet been reduced to writing. At worst, Union representative St. Johns expressed an opinion that the contract language which would be relevant to Penman's case had not changed. If that opinion was wrong, St. Johns was wrong on a matter of judgment, and federal law finds no breach of the duty of fair representation. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976); *Peterson, supra*, 771 F.2d at 1254-55.

Further, Appellant's situation differs from that in *Robesky*, in that as the trial court and the Court of Appeal both concluded, the Union in this case was extremely cooperative in helping Penman's chosen representative to prepare for and evaluate the case. Unlike the facts in *Robesky*, the Union's conduct here did not curtail Penman's right to go to arbitration. Rather, the Union undisputedly stood ready to proceed to arbitration, regardless of its view of the merits of Penman's case. It was Penman's chosen representative, Mr. Lowe, who chose an alternate path.

Thus it is not the intentional or unintentional conduct of the Union that is at issue here, but the clearly intentional and deliberate choice of Mr. Lowe. The only wrong charged to the Union by Penman is the Union's failure to disclose to Lowe a change in the new collective bargaining agreement which Penman now believes would have aided his case. Yet, in the best

judgment of the Union representative assisting Mr. Lowe, the new language was simply a repetition of an earlier provision which had been construed in arbitration decisions as ineffective to protect employees in Penman's job classification. The "new" language was therefore of no benefit to Penman. Because the Union's advice involved judgment and discretion, neither *Dutrisac* nor *Robesky* applies.

Regardless of who was responsible for the abandonment of Penman's grievance, however, the abandonment was premised on an interpretation of the collective bargaining agreement. If, as both the trial court and the Court of Appeal concluded, the responsibility lay with Mr. Lowe,[3] the Union is free from liability and affirmance of the summary judgment was correct. If, as Petitioner contends, Lowe acted in reliance upon what amounted to an incorrect

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[3] Because the grievant's chosen representative was an attorney, that attorney may certainly be presumed competent to form his own opinion as to the viability of his client's grievance. Additionally, had Mr. Lowe waited to abandon the grievance until after a copy of the new collective bargaining agreement was prepared, he would have been in a position to independently review the new contract language. Instead, it appears from the record that Mr. Lowe chose to rely upon the provisions of Article 68(c), the only substantive section on job tenure found in the 1976 contract. Presumably, Mr. Lowe's theory crumbled when the Union informed him that Article 68(c) was deleted from the new Agreement. Because Mr. Lowe apparently did not find the non-Article 68(c) "discharge for cause" provision in the 1976 Agreement a sound basis for argument, the record leaves very little doubt but that Mr. Lowe would have agreed with the Court of Appeal and found no *substantive* right to discharge only for cause in the relocated 1979 reference to "discharge for cause" found in the procedural language of the amended Article 7.

interpretation of the new contract, summary judgment was still the correct resolution of the case, in that federal law grants unions the discretion to make errors of judgment without liability. *Peterson, supra*, 771 F.2d at 1255.

D. Penman's "Evidence" Of Intentional Union Misconduct Does Not Affect The Correctness Of The Court Of Appeal's Decision.

Penman offers as "evidence" of the Union's alleged bad faith a memo from one employer representative to another, in which the former tells the latter that the Union representative is "going through the motions" of the grievance procedure. Petitioner's allegation of error is that the trial court, and later, the Court of Appeal, ignored the significance of this memo. If the lower courts did ignore the memo, they were simply following the law. Its contents are inadmissible hearsay under California Evidence Code Section 1200, and the California Code of Civil Procedure, Section 437(d), requires courts to consider only admissible evidence on motions for summary judgment.

Moreover, even assuming that the courts considered, and then rejected, the contents of the memo, such action is appropriate under federal law. It is not a union representative's level of personal enthusiasm which is at issue in a fair representation action, but whether or not the union's representation was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, supra*, 386 U.S. 171, 190; *Eichelberger v. NLRB, supra*,, 765 F.2d 851 (no breach where union's only effort was to read and reject the grievant's letter explaining her claim).

Petitioner's argument also fails because of the nature of appellate review. First, an appellate court must presume that the judgment or order appealed from was correctly decided by the trial court. *Denham v. Superior Court*, 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 69 (1970); *Walling v. Kimball*, 17 Cal.2d 364, 373, 110 P.2d 58, 63 (1941). The appellate court must adopt all inferences to affirm the judgment unless the record expressly contradicts them. Thus, unless the record affirmatively demonstrates the error, the appellate court must presume that the evidence and findings support the judgment, *Kompf v. Morrison*, 73 Cal.App.2d 284, 166 P.2d 350 (1946), and that that trial court based its decision on appropriate findings and disregarded incorrect or insufficient ones. *Brewer v. Simpson, supra*, 53 Cal.2d 567, 583, 2 Cal.Rptr. 609, 616.

In this case, the trial court held that:

> "There is no triable issue as to the material facts that the failure of Plaintiff through his attorney to complete the grievance procedure provided by the Collective Bargaining Agreement was a conscious decision based upon an evaluation of the chances of success of the claim and was not based on any matters stated by Union representatives or any delay in obtaining a copy of the 1979 Collective Bargaining Agreement."

(Petition, p. B-2)

Accordingly, the Court of Appeal was to extend great deference to the conclusion that no material factual issues remained. Nevertheless, the Court of Appeal specifically and independently refuted Appellant's argument to the contrary:

> "Penman's argument continues to the effect that a question remains as to whether Lowe's failure to take the case to arbitration was based upon a 'conscious decision' as found by the trial court, or was caused by St. Johns' false and fraudulently misleading advice.
>
> However, Penman's insistence that the Union breached its duty of fair representation to him through St. Johns' interpretation of the new Agreement is without justification. Simple negligence or errors in judgment on the part of a union are insufficient to support a breach of the union's duty of fair representation."

(Petition, p. A-12)

Inherent in the decisions of both lower courts is the conclusion that the alleged "evidence" of bad faith reviewed by each was insufficient to convince either court of the existence of a breach. Both concluded, as a matter of law, that no material factual issues remained and that on the basis of the undisputed record, summary judgment was appropriate. This conclusion is consistent with federal case law. See *Peterson, supra,* 771 F.2d 1244, and *Scott, supra,* 815 F.2d 1281.

Because the memo did not contain admissible evidence; because "going through the motions" is not actionable misconduct; and because the Court of Appeal adhered to both substantive federal law and the relevant state law standards for appellate review, Penman's bad faith argument fails to state a basis for a grant of certiorari.

III

THE COURT OF APPEAL ACTED CONSISTENTLY WITH FEDERAL LAW WHEN IT AFFIRMED SUMMARY JUDGMENT ON THE ISSUE OF EQUITABLE ESTOPPEL

The federal doctrine of equitable estoppel has four elements: (1) the union must have been aware of the true facts; (2) the union must have intended its misrepresentation to be acted upon or acted so as to confer a reasonable belief that it was so intended; (3) plaintiff must have been ignorant of the true facts; and (4) plaintiff must have detrimentally relied upon the union's misrepresentation. All four elements assume the falsehood of factual information given to an employee by a union.

In theory, the doctrine may be used to impose liability. In *Acri v. International Association of Machinists and Aerospace Workers*, 781 F.2d 1393 (9th Cir. 1986), union representatives told striking members that the company had agreed to remove the existing limit on severance pay. The membership ratified the new contract. Later, the membership realized that the company had not agreed to change the severance pay provisions. There was no breach of the duty of fair representation because plaintiffs could not prove that they would have voted differently had there been no misrepresentation, nor that the company would have agreed to the requested severance pay provision had the vote been different.

Similarly, there was no liability under an estoppel theory because the plaintiffs could not demonstrate

that they had relied on the misrepresentation to their detriment. The Ninth Circuit therefore upheld the summary judgment of the lower court on both theories.

Appellant had similar proof problems here. The undisputed record shows that:

(1) Lowe had a copy of the 1976 Agreement containing a provision concerning "discharge for cause";

(2) The Union gave Lowe copies of arbitration decisions discussing non-Roster employees' contractual rights upon discharge;

(3) The Union truthfully informed Lowe that the phrase "discharge for cause" contained in Article 63(b) of the 1976 Agreement was now included in the grievance and arbitration provisions of Article 7 of the new Agreement;

(4) The Union truthfully told Lowe that Section 68(c) of the 1976 Agreement had been eliminated in the 1979 Agreement and that the new Article 7 governed Penman's rights;

(5) Lowe made an independent evaluation of the merits of Appellant's grievance, and concluded that arbitration would be futile.

The doctrine of equitable estoppel thus has no application. Although the Union was aware of the true facts, i.e., that certain language had been deleted and other language rearranged, Lowe was also aware of the true facts. *There was no deception.* Because there was no misrepresentation, there was no mistaken reliance. The Court of Appeal correctly concluded that elements of the doctrine do not exist on the record.

CONCLUSION

For all the reasons set forth herein, Respondent Publicists Guild, Local 818, IATSE, respectfully requests that Penman's Petition for Writ of Certiorari be denied.

Dated: December 10, 1987

Respectfully submitted,

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TAYLOR, ROTH,
BUSH & GEFFNER
Counsel for Respondent

TERRI A. TUCKER
Appellate Counsel

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on December 10, 1987, I served the within *Respondent's Brief in Opposition To Petition For Writ Of Certiorari To The Court Of Appeal Of The State of California, Second Appellate District, Division Three* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

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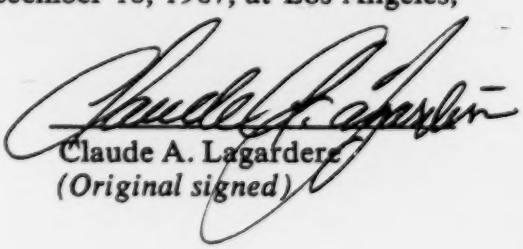
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 10, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)